

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP782

Cir. Ct. No. 2016CV3884

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. GERALD TUCKER,

PETITIONER-APPELLANT,

V.

BRIAN HAYES, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM SOSNAY, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Gerald Tucker, *pro se*, appeals from an order of the circuit court that denied his request to supplement the record on *certiorari* review and affirmed the Division of Hearings and Appeals' decision sustaining an administrative law judge's revocation of Tucker's probation. Tucker asserts that the Division acted arbitrarily and unreasonably and contends discretionary reversal is warranted. We reject Tucker's arguments and affirm the circuit court order.

BACKGROUND

¶2 In 1996, Tucker was convicted on two counts of sexual assault and two counts of armed and masked robbery. Tucker was sentenced to concurrent terms of imprisonment for the sexual assault convictions. He was sentenced to fifteen years' imprisonment for each robbery, concurrent with each other but consecutive to the sexual assault sentences. Additionally, the robbery sentences were imposed and stayed in favor of twelve years' probation, still consecutive to the sexual assault sentences. Tucker was released to probation in July 2013.

¶3 On March 11, 2015, Tucker's neighbor, Richard King, was shot and killed outside Tucker's home by Larry Johnson, an acquaintance of Tucker's. Tucker was fully aware of what transpired; several months after the shooting, Tucker would admit that he had gotten into an argument with King outside his home; his wife called Johnson, and, by the time Tucker spoke to Johnson on the phone, Johnson was already on his way to Tucker's home; Tucker went back outside and was approached by King and a man named Andre Dorsey; and, when Johnson arrived, Johnson shot and killed King. Immediately after the shooting, however, Tucker gave a different version of events. He claimed that as he was arguing with King outside of his home, a black male walked up to them, and King acted like he knew the man. Tucker turned his back to the others and, a few

seconds later, heard five or six gunshots, so he immediately fled into his house. Tucker said he did not know the man who approached but provided police with a description. Police took this as a description of the shooter, though Tucker later claimed to have been describing Dorsey. Police thus initially had no meaningful leads as to who killed King.

¶4 Tucker was taken into custody at the time and received a ninety-day sanction for having marijuana and an unauthorized cell phone. He received a second ninety-day sanction for behavioral issues while in jail on the first sanction. Tucker was released from custody on September 27, 2015.

¶5 On October 23, 2015, police informed Tucker's probation agent that they had linked Tucker to King's homicide. The gun used had been recovered, and its owner gave a statement that Johnson borrowed it around the time of the shooting. Tucker's phone records showed a call to Johnson just before the shooting. A warrant was issued for Tucker, who was picked up at an unauthorized location after his curfew.

¶6 On October 24, 2015, police interviewed Tucker. He continued to deny knowledge of or involvement in the shooting until police confronted him with their evidence. Tucker then decided to "come clean." Contrary to his previous denials that Johnson had been at his house that day, he admitted that he had argued with King before King was killed, that he had talked to Johnson before the shooting, and that Johnson showed up with a gun and shot King. Tucker then provided additional information to police that allowed them to apprehend Johnson. On November 3, 2015, Tucker gave a statement to a Department of Corrections

liaison agent at the request of his regular probation agent, though he failed to give true and correct information about the shooting.¹

¶7 The Department of Corrections recommended Tucker’s probation be revoked for five alleged rule violations: (1) an unauthorized residence; (2) failure to comply with the sex offender registry program because of failure to register the unauthorized residence; (3) failing to provide true and correct information in the November 3, 2015 statement to the Department; (4) a curfew violation; and (5) obstruction of a police investigation on October 24, 2015. A revocation hearing was held on January 26, 2016, at which Detective Brett Huston, who had interviewed Tucker on October 24, and Tucker testified. Tucker admitted the curfew violation and admitted he had always known who the shooter was. He explained that he had withheld the information because he feared being implicated as the shooter and that, once the police told him about the evidence they had, including the gun, he felt free to tell the truth because that evidence would corroborate his innocence.

¶8 The administrative law judge (ALJ) determined that there was insufficient evidence of the first two allegations. However, the ALJ found that Tucker admitted the curfew violation and that Tucker had failed to provide true and correct information to both the Department and the police. Specifically, the ALJ found that Tucker “admitted that he saw a man he knew shoot” King, “gave a false story to the police” and the Department, “maintained that false story

¹ For example, in portions of the statement transcribed by the agent that Tucker refused to sign, he indicated he had “no comment about what happened at my home regarding the shooting” and claimed he “didn’t have anyone come over to the house.” When asked why he lied to police, he wrote himself that he “just experienced a traumatic situation within a hour of questioning by police, my memory wasn’t [its] best.”

initially” when he was re-interviewed by police in October 2015, and “failed to give a true and correct statement” when he gave his statement to the Department in November 2015. The ALJ noted Tucker’s fear he would be blamed but stated that by “giving misleading information and concealing material evidence,” Tucker allowed Johnson to be at large in the community for several months.

¶9 The ALJ considered that Tucker had made “great strides in his character development,” that Tucker eventually did provide material information to the police, and the “potentially disproportionate impact” that revocation would impart. However, the ALJ observed that Tucker had “failed to prove that he has been rehabilitated” when he let his fear of a false accusation justify concealing facts about the shooter.² The ALJ concluded that it would depreciate the seriousness of Tucker’s violations if probation were not revoked, that there were no viable alternatives to revocation, and that Tucker was in need of correctional treatment best provided in a confined setting. It therefore ordered his probation revoked.

¶10 Tucker appealed to the Division. He asserted that he violated curfew because he had just learned of his niece’s death and was grieving with his family. He argued that he did eventually give “complete and truthful information” that allowed police to arrest Johnson. He also complained the sanction was excessive and that he had “previously been sanctioned for [the] allegations and has served that sanction.”

² Johnson had been arrested at the time of the shooting, but he was released due to insufficient evidence.

¶11 The Division sustained the revocation. The administrator noted that Tucker knew the shooter but lied to police and said he did not. Tucker further gave a misleading description of the shooter and specifically denied that Johnson, whom he knew to be the shooter, had been at his home that night. Tucker then maintained that lie until confronted by police, which, the administrator noted, “impaired the ability of law enforcement” to investigate and “jeopardized the safety of others in the community.” Though Tucker eventually told the truth, the administrator refused to ignore the fact that he misled authorities. The administrator further concluded that the ALJ “appropriately determined that Tucker is too great of a risk for conditional liberty on probation” and, thus, must now serve his underlying sentences.

¶12 Tucker petitioned the circuit court for *certiorari* review. The circuit court ordered briefing. In his brief, Tucker again argued his fear of being charged with the homicide was a justifiable reason for not fully divulging information to the police. He also asserted that he “feared for the safety of his family if he revealed the identity of the shooter” and “did not want the shooter to retaliate against his family[.]”

¶13 After briefing was complete, Tucker filed with the circuit court a motion to supplement the record, based on newly discovered evidence or the interests of justice, with a letter from the assistant district attorney who prosecuted Johnson.³ Tucker wanted to introduce the letter to corroborate his fear of retaliation. The Division as respondent objected to introducing the evidence on *certiorari* review, but it stated that it would not object to a stay of the proceedings

³ Johnson also went by the name Larry Jackson, which is the name used in the letter.

so that Tucker could directly petition the Division. However, Tucker apparently did not pursue relief directly from the Division.

¶14 The circuit court denied the supplementation request and affirmed the Division. Tucker appeals.

DISCUSSION

I. Standard of Review

¶15 “In a review of a decision to revoke probation, we defer to the decision of the Division of Hearings and Appeals, applying the same standard as the circuit court.” *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶10, 250 Wis. 2d 214, 640 N.W.2d 527. Our review is limited to four questions: “(1) whether the [Division] kept to its jurisdiction, (2) whether it acted according to law, (3) whether its decision was arbitrary and (4) whether the evidence provides reasonable support for the decision.” *State ex rel. Macemon v. McReynolds*, 208 Wis. 2d 594, 596, 561 N.W.2d 779 (Ct. App. 1997).

¶16 We afford the agency decision a presumption of correctness. *See State ex rel. Ziervogel v. Washington Cty. Bd. of Adjustment*, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401. On appeal, Tucker “bears the burden of proving that the decision was arbitrary and capricious.” *See Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994). “If the prisoner fails to sustain the burden, the courts will not interfere with the [Division’s] decision.” *State ex rel. Gendrich v. Litscher*, 2001 WI App 163, ¶4, 246 Wis. 2d 814, 632 N.W.2d 878.

¶17 “An agency’s decision is not arbitrary and capricious and represents its judgment if it represents a proper exercise of discretion. A proper exercise of

discretion contemplates a reasoning process based upon the facts of record ‘and a conclusion based on a logical rationale founded upon proper legal standards.’” *Von Arx*, 185 Wis. 2d at 656 (citations omitted). We do not substitute our judgment for the Division’s. *See id.* “If substantial evidence supports the [D]ivision’s determination, it must be affirmed even though the evidence may support a contrary determination.” *Id.*

II. Record Supplementation

¶18 Tucker complains that the circuit court erred when it refused to supplement the record with a letter from the assistant district attorney. In this letter, the attorney expressed his belief that Tucker was not initially honest with police because Johnson is “a violent gang member” and Tucker believed Johnson would hurt his family.

¶19 Decisions about whether to supplement the record are committed to the circuit court’s discretion. *See State ex rel. Treat v. Puckett*, 2002 WI App 58, ¶28, 252 Wis. 2d 404, 643 N.W.2d 515. However, “to preserve an issue for judicial review, a party must raise it before the administrative agency.” *See Bunker v. LIRC*, 2002 WI App 216, ¶15, 257 Wis. 2d 255, 650 N.W.2d 864. “Judicial review of an administrative agency decision contemplates review of the record developed before the agency.” *Id.* A reviewing court ordinarily “will not consider issues beyond those properly raised before the administrative agency[.]” *See id.*

¶20 During the administrative proceedings, Tucker never claimed to be fearful of retribution by Tucker, only of being falsely accused of the homicide.⁴ Moreover, while the Division objected to the motion to supplement the record in the circuit court, it noted that it would not object to a stay of the *certiorari* proceedings so that Tucker could directly petition the agency for relief. *See State ex rel. Booker v. Schwarz*, 2004 WI App 50, ¶15, 270 Wis. 2d 745, 678 N.W.2d 361 (suggesting that a claim for relief based on newly discovered evidence in administrative matters should be directed to the agency). But Tucker did not pursue that remedy. We therefore discern no erroneous exercise of discretion when the circuit court declined to expand the *certiorari* record beyond that which was before the Division.

III. The Division's Decision

A. Whether the Division Acted According to Law

¶21 Tucker claims the Division did not act according to law when it first imposed a ninety-day sanction and “subsequently revoked Tucker’s term of probation ... for the same conduct included in allegation No. 5.” This is a reference to his first probation hold from March 2015, imposed for possession of marijuana and an unauthorized cell phone. Assuming without deciding that the March sanction was also for not cooperating with the police, there is no overlap. Allegation 5 was that Tucker had failed to cooperate with police during the

⁴ Tucker claims the issue was raised in his November 3, 2015 statement when he said, “I did everything that happened that night to protect my family.” Aside from the fact that this statement is in the portion that Tucker refused to sign, the statement is too vague to be considered to be raising an issue of Tucker’s fear of Johnson’s retaliation. It could easily mean that Tucker lied to protect his family from the consequences of an incorrect homicide charge.

October 24, 2015 interview, and it is impossible for him to have been sanctioned in March 2015 for an event that did not occur until seven months later.

¶22 Presumably, Tucker views his non-cooperation as a single act. It is not. The October 24 interview offered Tucker a new chance to tell police what he knew. Instead of being forthcoming at the outset of the interview, he made a new choice to perpetuate his prior misinformation. Additionally, Tucker had signed new rules of supervision in September 2015, when he was released from the prior custodial hold, so the choice to give misleading information constituted a violation of a new set of rules. In other words, Tucker’s actions in March 2015 do not insulate him from the consequences of subsequent actions in October 2015.

¶23 In any event, as the circuit court noted, even one violation would be sufficient to support revocation. Tucker admitted his curfew violation and does not dispute that he failed to provide true and correct information to the Department. The Division acted according to law in revoking Tucker’s probation.

B. Whether the Evidence Supports the Decision

¶24 Tucker complains that insufficient evidence supports Allegation 5. He claims Detective Huston’s testimony “is nothing more than editorialized opinion.” But Tucker does not seriously dispute that he gave false and misleading information to police and obstructed the investigation. *See* WIS. STAT. § 946.41(2)(a) (2015-16) (criminal obstruction statute).⁵ Indeed, his attempts to justify doing so—explaining he feared being charged and feared Johnson’s

⁵ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

retaliation—are necessarily premised on a concession that he gave misleading information to police at the time of the shooting.

¶25 Nevertheless, the record supports revocation. According to Huston, Tucker continued to deny involvement in the homicide or knowledge of the shooter during the October 24 interview, insisting he did not know who shot King and denying Johnson’s presence at his home. The standard of review requires substantial evidence supporting the Division; substantial evidence “‘is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion.’” *Von Arx*, 185 Wis.2d at 656 (citation omitted). The evidence presented, including Huston’s testimony and police reports, fulfills that standard.

C. Whether the Division Acted Arbitrarily

¶26 Tucker also complains that it was “arbitrary and unreasonable” of the Division to revoke his probation in a twenty-year-old case when he was doing well on supervision, faced fifteen years’ imprisonment, and had a “legitimate reason” to withhold information from police.

¶27 In determining whether probation revocation is appropriate, the ALJ must conclude confinement is necessary to protect the public from further criminal activity by the probationer, the probationer needs correctional treatment that can most effectively be provided if confined, or it would unduly depreciate the seriousness of the violation if probation were not revoked. *See* WIS. ADMIN. CODE § HA 2.05(7)(b)3.a.-c. (through Mar. 2017). The ultimate question is whether a probationer is a “‘good risk’; whether his rehabilitation can be successfully achieved outside prison walls or will be furthered by returning him to a closed

society.” See *State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 385, 260 N.W.2d 727 (1978) (citations omitted).

¶28 The ALJ found that Tucker’s correctional needs would be best met in a confined setting and that it would unduly depreciate the seriousness of his violations if probation were not revoked. The Division agreed that Tucker is “too great of a risk for conditional liberty on probation” as his misinformation had “impaired the ability of law enforcement authorities to investigate a serious criminal matter” and jeopardized community safety.

¶29 To the extent that Tucker insists his deception was justified, he is incorrect. “[T]here is no exculpatory denial exception in the obstructing statute.” *State v. Reed*, 2005 WI 53, ¶48, 280 Wis. 2d 68, 695 N.W.2d 315. To the extent that Tucker complains that a fifteen-year prison sentence is a disproportionate penalty for his probation violations, we note that he was sentenced to fifteen years as a penalty for his armed robberies, not his curfew violation or misinformation.

IV. The Interests of Justice

¶30 Tucker also asserts that this matter should be remanded in the interests of justice for the circuit court to consider the district attorney’s letter. Discretionary reversal under WIS. STAT. § 752.35 is to be used only in exceptional cases. See *State v. McKellips*, 2016 WI 51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258. We are not persuaded this is an exceptional case. The Division’s decision to revoke Tucker’s probation is appropriately supported by substantial evidence, and Tucker’s explanations for lying to police do not mitigate his probation violations.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

